BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
CTIA Petition for Declaratory Ruling	)	

To: The Commission

REPLY COMMENTS OF XCEL ENERGY SERVICES INC.

Xcel Energy Services Inc. ("Xcel Energy"), on behalf of its utility operating subsidiaries, hereby submits these reply comments in response to the Federal Communications Commission's ("FCC" or "Commission") Public Notice requesting comment on the Petition for Declaratory Ruling filed by CTIA ("Petition").[1] Xcel Energy's reply comments exclusively concern pole attachment issues raised in CTIA's Petition and accordingly are being filed only in the above-referenced docket.[2]

Xcel Energy again urges the Commission to deny CTIA's Petition requesting declaratory rulings regarding Section 224 of the Communications Act, as amended (the "Act"), and the

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[1] / *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling*, Public Notice, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, DA 19-913 (rel. Sept. 13, 2019) ("Public Notice").

[2] / *See Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order Granting Extension of Time, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, DA 19-978 (rel. Sept. 30, 2019) ¶ 4 ("Filings that exclusively concern pole attachment issues should be filed in WC Docket No. 17-84 only.").

Commission's implementing regulations.[3] As discussed herein, CTIA's requested declarations are contrary to the text of the statute and to long-established Congressional, judicial, and Commission precedent. Furthermore, CTIA's requested declarations would have the practical effect of unnecessarily complicating and delaying – rather than facilitating – wireless deployment, which is a result precisely the opposite of what the Commission seeks to achieve.

I. STREET LIGHT POLES ARE OUTSIDE THE SCOPE OF SECTION 224 OF THE COMMUNICATIONS ACT

As demonstrated in the initial comments submitted by Xcel Energy and other utility commenters, CTIA and those commenters supporting its Petition either fail to acknowledge or simply do not understand the fundamental difference between dedicated street light poles and electric utility distribution poles.[4] As Xcel Energy explained, distribution poles are designed and engineered with sufficient strength to support aerial electric distribution lines and associated equipment, as well as aerial communications lines.[5] In some cases, a street light mast arm may be attached to a distribution pole. To be clear, however, in such cases the pole itself is still

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[3] / 47 U.S.C. § 224; 47 C.F.R. §§ 1.1401 *et seq*.

[4] / *See* Comments of Xcel Energy Services, WC Docket No. 17-84 (filed Oct. 29, 2019) ("Xcel Energy Comments"); Comments of Ameren Service Company, American Electric Power Service Corp., Duke Energy Corp., Entergy Corp., Oncor Electric Delivery Company LLC, Southern Company and Tampa Electric Company, WT Docket No. 17-84 (filed Oct. 29, 2019) ("Ameren, et al., Comments"); Opposition of the POWER Coalition, WT Docket No. 17-84 (filed Oct. 29, 2019) ("POWER Coalition Comments"); Comments of the Coalition of Concerned Utilities, WT Docket No. 17-84 (filed Oct. 29, 2019) ("CCU Comments"); Opposition of the Edison Electric Institute, Utilities Technology Council, and National Rural Electric Cooperative Association, WT Docket No. 17-84 (filed Oct. 29, 2019) ("Utility Association Comments").

[5] / Xcel Energy Comments at 4.

considered to be a distribution pole and thus remains subject to the same pole attachment rules as any other distribution pole, regardless of the presence of a street light fixture.[6]

In contrast, street light poles do not support electric distribution facilities and are not a part of a utility's local distribution network.[7] Rather, they are installed at the request of a customer (*e.g.*, a municipality or a homeowners' association) for the primary purpose of providing public lighting.[8] Significantly, the vast majority of street light poles owned by Xcel Energy and other utilities do not have the structural capacity or capability to support communications attachments, meaning that the entire street light pole must be replaced with a new street light pole with expanded capacity in order to accommodate wireless colocation.

Each of these distinctions serves to underscore that utility-owned street light poles are outside the scope of Section 224 of the Act and the Commission's implementing regulations, as reflected in long-standing court and Commission precedent,[9] as well as in the legislative history of Section 224 itself.[10] The Commission should therefore reject CTIA's requested declaration.

In urging the Commission to extend its pole attachment regulations to include utility-owned "light poles," CTIA and those commenters supporting its Petition rely primarily on one part of an opinion issued by the U.S. Court of Appeals for the Eleventh Circuit for the

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[6] / Xcel Energy Comments at 4-5. AT&T's concern that utilities "could unilaterally remove any pole from Section 224 simply by adding lighting features to the pole" is therefore baseless. Comments of AT&T, WC Docket No. 17-84 (filed Oct. 29, 2019) at 25.

[7] / Xcel Energy Comments at 5. *See also* Ameren, et al. Comments at 10-11; Utility Association Comments at 8-9.

[8] / Xcel Energy Comments at 6. *See also* Ameren, et al. Comments at 11; POWER Coalition Comments at 8-9; Utility Association Comments at 4.

[9] / *See, e.g.*, Ameren, et al. Comments at 5-10; POWER Coalition Comments at 4-7; CCU Comments at 8-11; Utility Association Comments at 5-9.

[10] / *See* Ameren, et al. Comments at 5-7.

proposition that the use of the word "any" in Section 224(f)(1) purportedly expands the coverage of the Act to include all "poles" owned or controlled by a utility, including "light poles."[11] However, in a preceding section of the same opinion, the Eleventh Circuit held that the "text of the statute … make[s] it plain that the Act's coverage was intended to be limited to the utilities' *local distribution facilities*"[12] – *i.e.*, those poles, ducts, and conduit that are "regular components of local distribution systems[.]"[13] The Eleventh Circuit further defined the local distribution system as "comprised of substations, underground cables, poles, overhead conductors, transformers, service drops, and meters *that supply power to the customer*."[14] Thus, when the *Southern Company* decision is considered in its entirety – as it must be – it is clear that the Eleventh Circuit held (1) that the Act's coverage is limited to local distribution facilities;[15] and (2) the Act applies to all poles, ducts and conduits that fall within that defined scope of coverage – *i.e.*, those that are part of a utility's local distribution system – even if they are not used for wire communications.[16] Because dedicated street light poles are not part of a utility's local distribution network and do not supply power to the customer, they are outside of the established scope of Section 224 of the Act.

Some commenters ignore or disregard decades of practice and precedent and urge the Commission to define the term "pole" for purposes of Section 224 as broadly as possible,

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[11] / *See, e.g.*, CTIA Petition at 23-25 (citing *Southern Company v. FCC*, 293 F.3d 1338, 1349-50 (11th Circuit 2002) ("*Southern Company*")).

[12] / *Southern Company*, 293 F.3d at 1345 (emphasis added).

[13] / *Id*. at 1344.

[14] / *Id*. at 1333-34 (quoting the Connecticut Department of Public Utility Control)(emphasis added).

[15] / *Id*. at 1344-45.

[16] / *Id*. at 1349-50.

regardless of what such a "pole" may actually be used for.[17] For example, Verizon asserts that a "pole" should be defined as either "a long slender usually cylindrical object" or a "long, relatively slender, generally rounded piece of wood or other material" [18] – definitions that could be applied to any flag pole, fence post, or even sign post located on utility-owned property. However, the Commission itself has long recognized that Congress could not have intended such an expansive definition – and absurd result – when adopting, and later amending, Section 224. As the Commission held in 1996, "The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to 'piggyback' along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility."[19]

Xcel Energy furthermore agrees with other commenters that any expansion of the scope of the Commission's pole attachment rules to include street light poles implicates a host of additional serious, and complex, legal issues.[20] For example, the Commission's existing rate formula for telecom attachments is based on the relevant FERC accounts for electric utility distribution poles, but does not consider or in any way account for the costs of street light poles, which are booked to different FERC accounts.[21] The inability of utilities to recover these costs under the current formula necessarily raises an issue of takings and compensation under the Fifth

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[17] / *See, e.g.*, Comments of Verizon, WC Docket No. 17-84 (filed Oct. 29, 2019) at 3-4.

[18] / *Id*. at 3.

[19] / *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16085 ¶ 1185 (1996).

[20] / *See* POWER Coalition Comments at 7-11; CCU Comments at 21; Utility Association Comments at 10-11.

[21] / *See, e.g.*, Ameren, et al. Comments at 12; POWER Coalition Comments at 10-11; CCU Comments at 10-11 and 21.

Amendment.[22] In addition, and as explained in the record, street lights are generally governed by private contracts between a utility and a street light customer; the customer has rights under this contract, and a utility cannot do more than what the contract allows.[23] Expanding the Commission's pole attachment rules to street light poles would directly interfere with and abrogate the state-law contractual rights of utilities and of third parties who are not subject to the Commission's jurisdiction.[24]

Accordingly, the Commission should deny CTIA's request to interpret Section 224 of the Act and the Commission's implementing regulations in a way that would expand the scope of these regulations to include utility-owned light poles.

II. THE COMMISSION SHOULD CONFIRM THAT NONDISCRIMINATORY, GENERALLY APPLICABLE UTILITY CONSTRUCTION STANDARDS ARE PRESUMPTIVELY REASONABLE

Xcel Energy joins other utility commenters in urging the Commission to reject CTIA's request to effectively prohibit utilities from applying generally applicable construction standards on a uniform and nondiscriminatory basis.[25] The plain language of Section 224(f)(2) expressly allows a utility to deny access to its poles on a nondiscriminatory basis "where there is insufficient capacity and for reasons of safety, reliability and *generally applicable* engineering

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[22] / *See, e.g.*, Utility Association Comments at 7 (citing *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999)).

[23] / *See* Xcel Energy Comments at 6-7; POWER Coalition Comments at 8-9; Utility Association Comments at 4 and note 27.

[24] / *See, e.g.*, Ameren, et al. Comments at 11-12 ("The fact that the lighting customer (who is also usually the underlying land owner) is often outside the Commission's jurisdiction means that collocation on lighting support structures is not as simple as declaring that such support structures are 'poles' within the meaning of Section 224.").

[25] / *See* Ameren, et al. Comments at 17-22; POWER Coalition Comments at 13-18; CCU Comments at 21-26; Utility Association Comments at 13-23.

purposes."[26] As the POWER Coalition states, "Nothing in the text of Section 224 states or implies that a uniformly applied pole access restriction, based on any of the considerations identified in Section 224(f)(2), is unlawful simply because it impacts more than a single pole, and the Commission has never endorsed that interpretation."[27] To the contrary, as the POWER Coalition and other commenters point out, the Commission has consistently and expressly allowed electric utilities to adopt and apply nondiscriminatory standards, restrictions and requirements for the construction and installation of attachments on their distribution pole infrastructure.[28]

Moreover, granting CTIA's requested declaration would have the practical effect of frustrating, rather than promoting, wireless deployment – a result precisely the opposite of what the wireless industry and the Commission seeks to achieve. In 2010, the Commission expressly permitted electric utilities to adopt restrictions on pole attachment techniques, provided that any such restrictions are clear, objective, and applied on a nondiscriminatory basis.[29] In so doing, the Commission correctly observed that "[s]uch *ex ante* guidance will help attachers make informed decisions and should facilitate the attachment process."[30] Xcel Energy agrees that "uniform construction standards benefit both pole owners and wireless providers by setting uniform expectations, creating mutual understanding, and speeding deployment."[31] Significantly, such

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[26] / 47 U.S.C. § 224(f)(2) (emphasis added).

[27] / POWER Coalition Comments at 14.

[28] / POWER Coalition Comments at 14-15. *See also* Utility Association Comments at 15-16.

[29] / *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11871 (2010).

[30] / *Id*.

[31] / Ameren, et al. Comments at 20.

nondiscriminatory construction standards and requirements provide potential attachers with transparency, predictability, and certainty. This enables attachers to appropriately plan and design their deployments from the outset and thus minimize the time and expense of the application process.

The Commission should therefore reject CTIA's requested declaration and confirm that nondiscriminatory, generally applicable utility construction standards are presumptively reasonable and in fact serve to promote more rapid, efficient, and safe deployment of wireless and other communications infrastructure.

III. THE COMMISSION SHOULD NOT FORECLOSE THE ABILITY OF POLE OWNERS AND ATTACHERS TO ACHIEVE NEGOTIATED SOLUTIONS TO ACCESS AND DEPLOYMENT

Xcel Energy agrees with other commenters that the Commission should reject CTIA's request for a declaration that would prohibit pole owners and attachers from negotiating mutually beneficial solutions to pole access and infrastructure deployment to the extent they may be "inconsistent" or "conflict with" the Commission's pole attachment rules.[32] Such a declaration "would violate Section 224 and reverse decades of Commission precedent that favors privately negotiated solutions between utility pole owners and attachers."[33]

Various commenters describe in detail the long history of Congressional and Commission preference for – and encouragement of – privately-negotiated pole attachment agreements.[34] Just

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[32] / *See* Ameren, et al. Comments at 22-32; POWER Coalition Comments at 18-23; CCU Comments at 28-33; Utility Association Comments at 23-27.

[33] / Utility Association Comments at 23.

[34] / *See* Ameren, et al. Comments at 23-26; POWER Coalition Comments at 19-22; Utility Association Comments at 23-25.

last year, the Commission reaffirmed its support for negotiated agreements in its *2018 Order*, stating:

> [W]e emphasize that parties are welcome to reach bargained solutions that differ from our rules. Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions for themselves through voluntary privately-negotiated solutions.[35]

The Commission subsequently reaffirmed its position that parties may negotiate solutions that differ from its rules in its Reply Brief filed with the U.S. Court of Appeals for the Ninth Circuit in August 2019. Specifically, in defending its new rule on overlashing, the Commission stated to the Court:

> But that [overlashing] rule … does "not preclude" utilities "from negotiating" such matters "with pole users." Utilities and attachers remain free "to reach bargained solutions that differ from [FCC] rules," including agreements that require overlashers to perform engineering studies and submit specifications in advance.[36]

As demonstrated above, CTIA's requested declaration would represent a significant departure from – not an affirmation of – long-standing Commission policy and precedent.

CTIA's requested declaration would also be ineffective, impractical to manage, and would only serve to undermine good faith negotiations between parties. The Commission's rules and regulations on pole attachments have many gray areas, and parties often have differing – yet arguably reasonable – interpretations and understandings of what many of these rules and

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[35] / *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7711 ¶ 13 (2018) ("*2018 Order*"). In making this statement, the Commission in fact expressly rejected a request by Crown Castle "that would limit the scope of mutually bargained-for attachment solutions" by requiring the Commission's rules to "serve as a floor" and requiring negotiated agreements to "incorporate the new rules as a baseline." *Id*. at note 55.

[36] / Brief for Respondents at 40, *Am. Elec. Power Serv. Corp., et al. v. FCC*, et al., Nos. 18-72689, 19-70490 (9th Cir. Aug. 22, 2019) (internal citations omitted).

regulations mean or require. An interpretation that one party may view as "inconsistent" or "in conflict with" the Commission's rules may be perfectly reasonable from the perspective of another party, and vice versa. CTIA's requested declaration would therefore encourage obstinance rather than the resolution of these differences through discussion and negotiation, in contravention of established Commission policy and precedent. Moreover, CTIA's requested declaration would undermine attachers' and utilities' ability and incentive to discuss or negotiate innovative pole attachment solutions, which will be vital to current and future 5G and wireless deployment.

Finally, CTIA and those commenters supporting its Petition overlook the role of the Commission's long-standing "sign and sue" rule. Crown Castle and ExteNet assert that filing a complaint under "sign and sue" is not always viable for an attacher due to the time and resources required.[37] However, the mere existence of the "sign and sue" option serves as a significant deterrent to pole owners. As the Utility Associations explain, "Because utility companies desire business certainty, it is of no benefit to a utility pole owner whatsoever to negotiate attachment terms that may be unenforceable or reversed by the Commission after a protracted complaint proceeding. Moreover, in any case where a utility pole owner has made a valuable concession to an attacher as part of a *quid pro quo*, there remains a substantial risk that the benefit of the bargain to the utility pole owner would be lost if the attacher in the future elects to exercise its 'sign and sue' right."[38]

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[37] / Comments of Crown Castle Int'l Corp., WC Docket No. 17-84 (filed Oct. 29, 2019) ("Crown Castle Comments") at 46; Comments of ExteNet Systems, Inc., WC Docket No. 17-84 (filed Oct. 29, 2019) ("ExteNet Comments") at 9-10.

[38] / Utility Association Comments at 26-27.

IV. OTHER ISSUES RAISED IN RESPONSE TO THE CTIA PETITION

In response to the Commission's request for comments, certain parties raise additional issues beyond the scope of CTIA's Petition for Declaratory Ruling. In particular, Crown Castle and ExteNet introduce a number of new issues that were not raised in the CTIA Petition and thus are not appropriate for consideration in this proceeding.[39] Nevertheless, Xcel Energy hereby reserves the right to respond to these issues through the Commission's *ex parte* process.[40]

WHEREFORE, THE PREMISES CONSIDERED, Xcel Energy Services respectfully requests the Commission to take action in this docket consistent with the views expressed herein.

Respectfully submitted,

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39 / *See* Crown Castle Comments at 43-50; ExteNet Comments at 10-21.

40 / *See* Public Notice at 3.